IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 74-6438

EWELL SCOTT, etc.,

v.

KENTUCKY PAROLE BOARD, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I.

THE ELEMENTARY LIBERTY INTEREST IMPLICATED IN THE DECISION TO GRANT OR DENY PAROLE QUALIFIES FOR PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. UNDER THE PRACTICES OF THE EXISTING SYSTEM, PRISONERS HAVE A LEGITIMATE EXPECTATION OF RELEASE ON PAROLE SUFFICIENT TO TRIGGER THE PROCEDURAL PROTECTIONS OF THE DUE PROCESS CLAUSE.

In the face of the "'magestic'" concept of liberty, Board of Regents v. Roth, 408 U.S. 564, 571 (1972), the state and the Solicitor General argue, on the following grounds, that parole release decisionmaking is immune from the requirements of the due process clause.[1] They assert that no liberty interest is involved in the parole decision because it is impossible for an individual prisoner to maintain that he or she is absolutely entitled to release on parole. No such claim can be made, they argue, because the parole decision is "committed to the essentially unfettered discretion of a group of experts" (Brief for United States at 15). The perspective of parole and its place in the criminal justice system upon which this position is based is a serious distortion of reality. A more detailed and accurate picture of the parole system as it exists today will reveal the flaws in the state's and Solicitor General's due process analysis.

[1] "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Board of Regents v. Roth 408 U.S. at 572. In keeping with this definition, the Court has been vigilant in rectifying deprivations of constitutionally protected liberty. See O'Conner v. Donaldson, 422 U.S. 563 (1975); Jackson v. Indiana, 406 U.S. 717 (1972). It is indeed "paradoxical" (Brief for United States at 17) that the parole release decision, involving as it does nothing less than "elemental freedom from external restraint," Arnett v. Kennedy, 416 U.S. 134, 157 (1974) (Rehnquist, J., opinion announcing judgment) is thought to escape constitutional scrutiny.

This picture will show that parole is a vital part of the process of governmental decisionmaking -- starting with arrest -- that determines the length of confinement for persons involved in the criminal justice system; that, as part of this accepted process, parole is realized by a large majority of prisoners; and that parole is a practice which not only, under Morrissey v. Brewer, 408 U.S. 471 (1972), implicates a constitutionally protected liberty interest but also creates a legitimate claim of entitlement for prisoners that parole will be granted upon a showing adequate under both the explicit and implicit release criteria used by parole boards.

As recounted more fully in the Brief for Petitioner, pp. 21-31, parole is expected -- by legislatures, judges, prisoners, and parole boards -- to be the central process for releasing prisoners from confinement. Under the indeterminate sentencing laws of most states, the parole authority is, in fact, the body that determines the actual length of confinement for a prisoner.[2] In Kentucky, this reality is made explicit:

> "[A]n initial determination of the length of imprisonment for felonies is to be made by the jury trying the issue of innocence or guilt....Once this responsibility of the jury is satisfied, the trial judge has at his disposal the power of modification granted by KRS 532.070 and the power granted by Chapter 533 to substitute probation or conditional discharge in place of imprisonment. If neither of these powers is exercised or one is exercised in a way that immediately or ultimately results in imprisonment, the offender is committed to the Department of Corrections for the maximum term of imprisonment established by the jury. The actual length of imprisonment is determined by the Parole Board ...." Commentary, Kentucky Penal Code, Ky. Rev. Stat. §532.060 (emphasis added).

[2] "[T]he parole implications of a sentence are a necessary and important factor for the consideration of the sentencing judge." United States v. Slutsky, 514 F.2d 1222,1229 196(2d Cir. 1975). This realization has been expressed recently by a number of courts which have considered modifying a defendant's sentence to insure that the individual would be released by the Parole Board at the time contemplated by the court, not later. See United States v. Russo, 535 F.2d 673 (1st Cir. 1976); United States v. Silverman, 406 F. Supp. 862 (D.N.J. 1975); United States v. Manderville 396 F. Supp. 1244 (D. Conn. 1975).

In light of the fact that approximately 60% of the releases of adult felons from Kentucky institutions are through parole (of those who are released, 68% are released following their first appearance before the Board), Kentucky Bureau of Corrections, Office of Statistical Information, Parole Recommendation and Deferment: A Study of the Kentucky Parole Board's Activities for 1973-74 at 1,6 (1975), it vitiates the role of reality in constitutional adjudication to say that "by virtue of his felony conviction the petitoner [h]as been constitutionally deprived of any interest in his own liberty by mandate of law until such time as he ha[s] served the sentence meted out to him, minus good time" (Brief for Respondent at 17). This proposition finds scant support not only in the understanding of the parole process but also in the teaching of Morrissey v. Brewer, 408 U.S. 471 (1971).[3]

In Morrissey, the Court recognized that a prisoner can be deprived of certain aspects of liberty sufficient to invoke due process protection. Because so many elements of the constitutionally protected right to liberty were implicated in the decision to revoke parole, the Court required the Parole Board to abide by minimum standards of due process. This analysis of the parolee's liberty interest in parole underscored the importance of "eschew-[ing] rigid or formalistic limitations on the protection of procedural due process...." Board of Regents v. Roth, 408 U.S. at 172:

> "[T]ermination of parole inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen within the protection of the Fourteenth Amendment." Morrissey v. Brewer, 408 U.S. at 482.[4]

Under this reasoning, the exclusion of the parole release decision from the confines of the Fourteenth Amendment "would be to create a distinction too gossamer-thin to stand close analysis." United States ex el. Johnson v. Chairman N.Y. State Board of Parole, 500 F2d. 925, 928 (2d Cir.), vacated as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1974)[5].

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[3] In a number of cases, the Court has expressed the awareness that, while a conviction is a constitutionally adequate predicate for imposing confinement as long as life (or imposing death where appropriate safeguards exist, see Gregg v. Georgia, 96 S.Ct. 2909 (1976)), any decision regarding the duration of confinement must be preceded by due process. See Mempa v. Rhay, 389 U.S. 128 (1967); Williams v. New York, 337 U.S. 241 (1949); see also Humphrey v. Cady, 405 U.S. 504 (1972); Specht v. Patterson 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966)

[4] The Solicitor General objects to the characterication of his analytical approach to due process as a revival of the discredited right-privilege distinction (Brief for United States at 23 n.13). Yet, as recognized in Cardaropoli v. Norton, 523 F.2d 990, 995 n.11 (2d Cir. 1975), the similarities are evident. To distinguish solely between "entitlements" and "unilateral expectations" is to create a dichotomy almost as analytically unhelpful as the right-privilege approach. Such an approach fails to include in its analysis an appreciation of the totality governmental function (here, parole release decision making) involved, but instead focuses on state positive law as the sole determinant of constitutional rights. Such an approach, while striving for regularity and consistency (as did the right-privilege distinction) and attempting to avoid recourse to "the loose constellation of constitutionally based values that underlines the analysis of claims of 'liberty' interest in non-prisoner cases" (Brief for United States at 12, 19), contradicts itself by permitting the state to carve out islands of lawlessness in ultimate derogation of the values of regularity and consistency the approach purports to further. Cf. Elrod v. Burns, 96 S.Ct. 2673, 2683 (1976).

[5] Since the decision in Morrissey, only one Court of Appeal has held to the position that due process does not attach to parole release decisions. Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976) (2-1 decision), petition for cert. filed, May 7, 1976 (No. 75-1623).

In Meachum v. Fano, 96 S.Ct. 2532 (1976) and Montanye v. Haymes, 96 S.Ct. 2543 (1976), the Court, refusing to "place the [Due Process] Clause astride the day-to-day functioning of state prisons, 96 S.Ct. at 2540, rejected the applicability of due process requirements to intra-state prison transfers. In these cases, the constitutional issue was of a completely different magnitude from the one presented here in two ways. First, a decision regarding continued incarceration was not involved. Unlike a prisoner's "ephemeral and insubstantial," id., interest in movement within a state penal system, the interest that is at stake here embodies "many of the core values of unqualified liberty." Morrissey v. Brewer, 408 U.S. at 482. Second, transfers between institutions often involve questions of institutional security that demand prompt action. These decisions are wholly unlike the decision to grant or deny parole, where decisionmaking places a much greater emphasis on informed principle than on speed.

The respondents' approach also includes in its calculus major reliance on the "unfettered discretion" purportedly accorded parole boards in determining whether to release a prisoner on parole. In essence, it is contended that unless eligibility for parole is clear-cut, any measure of discretion contained in the eligibility decision destroys an individual's "entitlement," and, presumably, converts it into a "unilateral expectation." This notion of discretionary decisionmaking once again is at odds with the way parole boards act in practice.

The fact that many parole administrators have not articulated standards guiding their release decisions does not mean that such standards are not employed. Indeed, as stated by the current Chairman of the United States Parole Board:

> "Without explicit policy to structure and guide discretions, decision-makers, whether parole board members, hearing examiners, or judges, tend to function as rugged individualists. While this may be desirable in our economic system, its suitability for our system of criminal justice is extremely questionable. However, if we can make what we are presently doing explicit and, thus, more consistent, we will be fairer and closer to justice." M. Sigler, Preface in P. Hoffman & D. Gottfredson, Paroling Policy Guidelines: A Matter of Equity (June, 1973) (NCCD Parole Decision-making Project Supp. Rep. 9) (emphasis added).

If it is accepted that parole boards employ implicit criteria in selecting individuals for release, the idea of unfettered discretion cannot be used to suggest that no prisoners are entitled to release. Many plainly are, and the fact that the selection criteria have not been made explicit should not shield parole boards from the limits of the Constitution.[6]

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[6]The fact that most prisoners are paroled supports the argument that, at any given time, a large number of, prisoners are "entitled" to parole, whatever the discretion formally excerised by the parole board. The fact that neither these individuals nor the parole board know who they are in advance of the actual parole decision should not diminish their claims for due process protection. Such a blunderbuss denial of constitutional rights should not be tolerated. Cf. Vlandis v. Kline, 412 U.S. 441 (1973).

Under the system of parole described above, it can be seen that a prisoner's interest in parole is a product of the practices and understanding that have grown out of the body of rules that govern the operation of the parole process. In essence, there is a practice of granting parole upon a finding that certain criteria are met by the prisoner. The fact that these criteria are not all published, or even articulated by all Boards, does not mean that the parole administrators do not rely on such principles in their decisionmaking. In this way, they are little different from administrators who make eligibility decisions regarding welfare or unemployment compensation by applying preconceived criteria to congeries of fact situations. For all of these administrators, it is acknowledged that a measure of discretion is part of their routine.

In this case, the practice of granting parole gives rise to a legitimate claim of entitlement. This occurs because parole is an institutionalized routine of assumedly principled governmental determinations, where a set of criteria are applied to individual situations yielding a given result (parole) upon a finding that an adequate showing was made under the circumstances. Under this system, the prisoner's interest is "secured by 'existing rules and understandings.' [Roth] at 577. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at the hearing." Perry v. Sindermann, 408 U.S. 593, 601 (1972). Just as in Perry with respect to job tenure, there exists in the parole system "an unwritten 'common law,'" id. at 602, that parole is the norm. It is this norm that gives rise to a legitimate claim of entitlement "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." Board of Regents v. Roth, supra, 577.

There are two additional grounds supporting the application of due process in this case. The first, which fits neatly within the bounds of our opponents' theories, rests on the grant of parole eligibility to prisoners. As recognized by the state

(Brief for Respondents at 17), prisoners in Kentucky, after serving a specified portion of their sentence, become eligible for parole under the regulations of the Parole Board. Ky. Admin. Reg. 501, 1:010 §§2-7. Under the analysis advanced by the state and the Solicitor General, this eligibility should be conceived of as entitlement warranting the procedural protections of due process when it is deferred or "divested" (Brief for United States at 21) through an adverse parole decision rendered according to the standards used by the Board. Whether denominated a liberty or property interest, the legitimate entitlement to parole eligibility should qualify for process protection.

A second, independent ground of decision rests on a prisoner's interest not in parole per se but in rational consideration for parole. This ground is anchored in the statutory scheme governing the operations of the Kentucky Parole Board. As detailed in the Brief for Petitoner, pp. 6-8, the Parole Board, in considering whether to grant or deny parole, is required to amass a considerable amount of data on each eligible prisoner,[7]

[7]The board's handling of prisoner records was severely criticized in a report published last May by the Governor's Select Advisory Committee on Prisons. This blue-ribbon panel found: "The content and quality of records submitted to the Parole Board are factors which have contributed to the controversy which led to this aspect of the investigation. The quality of the records submitted is poor. Reports are prepared by caseworkers who are often untrained and poorly supervised. There are so few caseworkers that they could not possibly know all of the inmates assigned to their caseload." The Governor's Select Advisory Committee on Prisons, Report to the Honorable Julian M. Carroll 8 (May 5, 1976). The panel also cited prisoners' inability to have access to the Board's files as a contributing factor to the widespread suspicion among inmates and correctional personnel that Board files are the subject of "inappropriate influence." To dispell these problems in the parole release process, the panel recommended that: (1) through counsel, inmates have access to the records of the deliberations and decisions of the Board; (2)upon rendering its judgment, the Board give a written copy of its decision to each inmate, and (3) inmates be given the right to representation by a lawyer in parole hearings. The panel concluded by noting that "[a]lthough the Board may view such measures as troublesome, these changes would have beneficial results which would offset any inconveniences to the Parole Board." Id. at 10. As yet, no action has been taken on these recommendations.

In marked contrast to the system in Kentucky, the U.S. Parole Board is now required to accord inmates substantial due process protection in parole hearings. Parole Commission and Reorganization Act of 1976, 18 U.S.C. §4201 et seq. These procedural guarantees include access to evidence to be considered at the hearing (with limited exceptions), access to an advocate prior to and during the hearing, a "full and complete record" of the hearing, and a written explanation for denial. 18 U.S.C. §4208.

conduct a hearing, engage in some form of collegial decisonmaking, and promulgate regulations which "shall be in accordance with prevailing ideas of correction and reform." Ky. Rev. Stat. §340(3). This scheme evinces an intention on the part of the Kentucky legislature to provide prisoners with a fair and rational opportunity for parole consideration.[8] Without the safeguards urged by the petitioners, the current process falls far short of the legislature's goal. It can thus be argued that an entitlement to rational decisionmaking has been conferred on prisoners which is abridged by the current practices of the Board.[9]

B. THAT PRISONERS DO NOT PRESENTLY ENJOY CONDITIONAL LIBERTY IS NO BAR TO THE RECOGNITION OF DUE PROCESS RIGHTS IN THE PAROLE RELEASE PROCESS.

As a precondition to the recognition of due process rights, the state argues that "in each and every instance the protections attendant to the Due Process Clause have only been extended where an individual is presently enjoying or is presently entitled to an interest which has been extended to him (Brief for Respondents at 23) (emphasis in original).[10] This purported requirement, however, is not harmony with a number of cases of this Court, the

[8]That the Kentucky legislature did not envision a regime of unbridled discretion distinguishes this case from Board of Regents v. Roth, supra, where the legislature provided no constraints on or guidance whatsoever to the administrators involved in the decision whether to rehire a non-tenured teacher for another year. Roth also turned on the realization that Roth "remain[ed] as free as before to seek another [job]." 408 U.S. at 575. The consequences of an adverse parole decision are clearly more momentous. Moreover, the functional utility of a hearing in Roth was dubious. There can be little doubt but that the university decisionmakers included individuals very familiar with Roth's work and personal qualities. In contrast, the parole decision normally involves a meeting among strangers. Cf. Goss v. Lopez, 419 U.S. 565, 594-95 (1975) (Powell, J., dissenting).

[9]While the legislature has provided a statutory guarantee of fair consideration, it has not "expressly provided also for the procedure by which [parole suitability is] to be determined and expressly omitted the procedural guarantees which [petitioner] insists are mandated by the Constitution." Arnett v Kennedy, 416, U.S. 134, 152 (1974) (Rehnquist, J., opinion announcing judgment). The position of the majority of the Court in Kennedy a fortiori supports petitioners' position here. Id. at 166-67 (Powell, J.), 185(White J.), 210-11 (Marshall, J.).

[10]The Solicitor General does not appear to support the state's insistence on applying a "present enjoyment" test. In fact, he concedes that an applicant for unemployment benefits would be entitled to due process. Brief for United States at 23 n.13.

most recent of which is Hampton v. Mow Sun Wong, 96 S.Ct. 1895 (1976).

There, the Court held that a Civil Service Commission rule barring aliens from positions in the federal service was of sufficient significance to be characterized as a deprivation of liberty which must be accompanied by the due process. No distinction was made between those plaintiffs who held federal employment and were fired and those who had applied and were not hired. Id. at 1899-1900. As recognized in the dissenting opinion of Mr. Justice Rehnquist, id. at 1913-14, the majority opinion rested on a passage from Board of Regents v. Roth, supra, which, in turn, included such cases as Schware v. Board of Bar Examiners, 333 U.S. 232 (1957) and Willner v. Committee on Character, 373 U.S. 96 (1963).[11] In neither of these cases was the applicant "presently enjoying" a status he desired; yet due process requirements were held to apply. Mow Sun Wong's approving citation to these precedents can only be taken as a repudiation of the present enjoyment notion urged by the respondents.

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[11]Another case cited in Roth also is persuasive precedent on this point. In Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926), the petitioner, a lawyer, was denied admission to practice before the Board of Tax Appeals under the discretionary power exercised by the Board. The denial was accomplished without a prior hearing or a statement of reasons. In holding that due process applied to the lawyer's claim of eligibility to practice, it said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." Id. as 123. This position, and the one assested by the petitioners in this case, rest ultimately on no more controversial a ground than that the discretion of a decisionmaker is a discretion to be exercised under law. See Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961) ("One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.")

The state construes Wolff v. McDonnell, 418 U.S. 539 (1974) as demanding satisfaction of a present enjoyment test. Such a wooden reading of McDonnell cannot be countenanced. To say that the prisoners there were "presently enjoying" good time credits is to stretch the concept beyond logical limits.

II.

THE RELEASE ON PAROLE OF THE NAMED PETITIONER DOES NOT MOOT THIS ACTION.

As developed below, there are three independent reasons why this action should not be considered moot. Before discussing them, however, it is instructive to reconstruct the events leading to the commencement of this action. Such a brief review will show the both elusiveness and continuing vitality of the issues presented in this case.

Rebuffed in prior attempts -- litigated pro se -- in both state and federal courts to infuse due process strictures into parole release hearings conducted by the Kentucky Parole Board (compare Harrison v. Robuck, 508 S.W. 2d 767 (Ky. 1974) with Ornitz v. Robuck, 366 F. Supp. 183 (E.D. Ky. 1973)), a group of prisoners at the Kentucky State Penitentiary contacted the undersigned counsel, who had litigated other issues against the Kentucky Parole Board (see, e.g., Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974) and Forbes v. Roebuck [sic], 368 F. Supp. 817 (E.D. Ky. 1974)), and requested representation in what became the current action. As part of the preparation for drafting the Complaint, counsel received a number of statements from prisoners then confined at the Kentucky State Penitentiary and Kentucky State Reformatory setting forth grievances these men had against the parole release procedures employed by the Parole Board. Samples of these statements are attached to petitioners' previously filed Response in Opposition to Respondents' Motion to Dismiss. From these original statments, counsel chose Ewell Scott and Calvin Bell to serve as named plaintiffs in the Complaint because their fact situations were considered representative of the class.

As filed, the Complaint named Ewell Scott and Calvin Bell as plaintiffs suing on behalf of the class of Kentucky prisoners subject to the jurisdiction of the Parole Board. Paragraph three of the Complaint (A. 2-3) specifically alleged all the requisites for maintaining a class action pursuant to Fed. R. Civ. P.23

(b)(a). Since the District Court did not permit the Complaint to be formally filed, counsel was precluded from moving to certify the action as required by Fed. R. Civ. P. 23 (c)(1) and proceeded on appeal both to the Sixth Circuit and this Court on the assumption that the class action allegations in the Complaint were well taken. This assumption was grounded in part on language in the Memorandum of the District Court and Order of the Sixth Circuit. both of which acknowledged the class action status of this case.

Upon the granting of certiorari on December 15, 1975, counsel immediately attempted to contact the petitioner Scott only to learn that he had been paroled a mere two and one-half weeks prior.[12] Pursuing their responsibilities as attorneys for the class, counsel contacted Kentucky prisoners who both before and during the course of the lawsuit had contacted them about the issues presented in the case and secured the statements attached to petitioners' previously filed Motion to Substitue Named Petitioners, or, In the Alternative to Intervene. These statements, which set forth the experiences of these prisoners before the Parole Board in the parole release process, are intended to demonstrate, if necessary, that the issues raised in this case continue vitally to affect virtually all prisoners in the Kentucky penal system.

A. DESPITE HIS RELEASE ON PAROLE, THIS CAUSE IS NOT MOOT FOR THE NAMED PETITIONER, WHO MAINTAINS A PRESENT INTEREST IN THE PAROLE RELEASE PRACTICES OF THE PAROLE BOARD.

Although released from prison almost one year ago, the petitioner Scott is still subject to the jurisdiction of the Kentucky Parole Board until 1984. He is, moreover, on close parole supervision, a more restrictive status entailing additional conditions of parole. Although it is to be hoped that the petitioner scrupulously will abide by the terms and conditions

[12]In the same inquiry counsel also learned that the plaintiff Bell had died.

of his parole, the experience of the Kentucky Parole Board shows that he may well be numbered among the approximately one-third of the parolees in Kentucky whose paroles are revoked for any number of potential violations.[13] Should this more than speculative eventuality occur, the petitioner will find himself again before the Parole Board seeking parole.[14]

Whatever role they may play in the petitioner's future, the parole release practices of the Board have played a prominent role in shaping the petitioner's present life. The restrictive status imposed by the Board on the petitioner may not have been imposed had the petitioner been given an opportunity to speak in his own behalf concerning the desirability of the special conditions he currently is abiding by. For example, as a condition of his parole, the petitioner is compelled to undergo outpatient treatment at a local mental health center. Had petitioner had the chance to discuss the benefits he derived from the group therapy programs he had participated in while in prison, the condition of outpatient treatment -- certainly an involuntary intrusion on his life -- may never have been imposed. In this second way, the petitioner maintains a present interest in the outcome of this case.

In In re Sturm, 521 P.2d 97 (Cal. 1974), a constitutional challenge to parole release policies was found not to be moot even though the petitioner in the action -- a non-class action -- was on parole. The Court declared:

> "Although petitioner and the Authority offer conflicting views as to the continued existence of a genuine controversy, this court may entertain the petition notwithstanding that the petitioner is now on parole. Petitioner remains within the constructive control of the Authority even though he has been released from actual physical custody." Id. at 101.

[13]It is the policy of the Board to institute parole revocation proceedings for the alleged commission of "technical" violations of any of the numerous conditions of parole. Cf. Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974).

[14]In Morrissey v. Brewer, 408 U.S. 484 (1972), the harsh realities of parole revocation were recognized by the Court: "Yet, revocation of parole is not an unusual phenomenon affecting only a few parolees. It has been estimated that 35% - 45% of all parolees are subject to revocation and return to prison." Id. at 479.

Similar results have been reached by federal courts in analogous prison cases in recognition of the principle that modification of the custodial status of the named parties should not moot the case. See Ramer v. Saxbe, 522 F.2d 695, 703-05 (D.C. Cir. 1975) ("If the appellees are correct in their apparent position that only persons actually in custody...may press these issues, it may be difficult to find any single plaintiff who would remain eligible to do so throughout lengthy adjudicatory processes."); Workman v. Mitchell, 502 F.2d 1201, 1208 (9th Cir. 1974) ("However meritorious the motive may have been for this transfer [of the named party to another institution], it would be intolerable to permit a defendant, in this manner, to destroy the representative capacity of a named plaintiff."); Morales v. Schmidt, 489 F.2d 1335, 1336 (7th Cir. 1973) ("[T]here is always the possibility that Morales during his period of parole will violate the terms of his conditional release and thus be returned to prison."), aff'd en banc, 494 F.2d 85 (1974).

The petitioner's current parole status distinguishes this case from the situation in Weinstein v. Bradford, 423 U.S. 147 (1975), where the prisoner who commenced the lawsuit was completely released from parole supervision by the time the case reached this Court. On the other hand, in the present case, if the petitioner is not found currently to be affected by the residual effects of the Board's parole release practices, the odds of his again becoming subject to the Board's persisting practices, while by no means certain, are quite real. The simple granting of parole under the circumstances presented here "should not preclude challenge to state policies that have their impact and that continue in force, unabated and unreviewed." Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 126-27 (1975). As he governmental entity most directly affecting the petitioner's daily life, the Kentucky Parole Board should not be immunized from judicial scrutiny simply because it has shifted a person, however temporarily, from one aspect of its operation to another.

B. SINCE THE CONTROVERSY BETWEEN THE PARTIES IS CAPABLE OF REPETITION, YET EVADING REVIEW, THIS ACTION IS NOT MOOT

On a number of occasions, most recently in Nebraska Press Association v. Stuart 96 S.Ct. 2791 (1976), this Court has recognized that if a controversy is capable of repetition, yet evading review, a ruling on the merits of the case is warranted even though the underlying dispute between the parties that led to the initiation of the lawsuit becomes dormant. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-79 (1968). In the present case, the realistic chances of the petitioner Scott again becoming subject to the parole release jurisdiction of the Parole Board already have been recounted. As discussed, the reappearance of the petitioner before the Parole Board certainly is as likely as the repetition of the short-term order in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911), or the reinstitution of proceedings seeking to remove the plaintiffs from the welfare rolls in Goldberg v. Kelly, 397 U.S. 254 (1970).

Besides being capable of repetition, the controversy in this case presents a classic example of an issue which has evaded the plenary review of this Court. On three prior occasions (Bradford v. Weinstein, 519 F. 2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975); Johnson v. Chairman, New York State Board of Parole, 500 F.2d 295 (2d Cir.), vacated as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1974); and Scarpa v. U.S. Board of Parole, 477 F.2d 278 (5th Cir.), remanded for consideration of the question of mootness, 414 U.S. 809, vacated as moot, 501 F.2d 992 (1973)), the Court, on the grounds of mootness, declined to address issues indentical to the ones presented here. Failure to resolve these issues in this case would only continue the kind of judicial merry-go-round the capable of repetition, yet evading review principle was designed to stop.

C. UNDER THE STANDARDS ENUNCIATED IN SOSNA V. IOWA, 419 U.S. 393 (1975) AND GERSTEIN V. PUGH, 420 U.S. 103 (1975), THIS CASE -- A CLASS ACTION -- IS NOT MOOT.

In Sosna v. Iowa, 419 U.S. 393 (1975), a controversy no longer alive as to the named plaintiff, an individual challenging a durational residency requirement for divorce, was found to be not moot for the class of persons the named plaintiff represented. Three factors were specified to guide the mootness inquiry: (1) whether the suit was certified as a class action, (2) whether a continuing controversy existed between the defendant and the members of the class; and (3) whether the controversy was capable of repetition, yet evading review. Determining that these factors were satisfied in Sosna, the Court turned from the issue of mootness to the question of the adequacy of representation under Fed. R. Civ. P. 23(a). On this point it found that "in the present suit, where it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of the class have been competently urged at each level of the proceeding, we believe that the test of Rule 23(a) is met." Id. at 406.

Applying the mootness test expounded in Sosna, the Court in Gerstein v. Pugh, 420 U.S. 103 (1975), held that, in a case challenging the constitutionality of certain pretrial detention procedures, the release from custody of the named plaintiffs did not moot the action. The reasoning employed by the Court should be used interchangeably to resolve the mootness issue in this case:

> "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'
>
> At the time the complaint was filed, the name respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under Sosna. But this case is a suitable exception to that requirement. See Sosna, supra, at 402 n. 11; cf. Rivera v. Freeman, 469 F.2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." Id. at 110-111, n.11.

Except for one factor, discussed more extensively below, the present case satisfies all the explicit criteria of Sosna and Pugh:

(1) There remains a live controversy between the members of the class and the Parole Board. As the statements attached to petitioners' Motion to Substitute show, there is grave dissatisfaction with the parole release procedures of the Board, and there has been for sometime. See Harrison v. Robuck, 508 S.W.2d 767 (Ky. 1974) and Ornitz v. Robuck, 366 F. Supp. 183 (E.D. Ky. 1973). This distinguishes the present case from Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975), where it appeared that a continuing controversy -- at least one sufficient for Art. III, §2 purposes -- no longer existed between the defendants and the remaining members of the class.

(2) The issues in this case are paradigms of those that are capable of repetition, yet evading review.

(3) As in Pugh, "the constant existence of a class of persons suffering the deprivation is certain" and it is undisputed that the attorneys representing the named petitioner "ha[ve] other clients with a continuing live interest in the case." Pugh, supra at 110-111 n.11.

(4) The named representative will fairly and adequately protect the interests of the class. In this case, as in Sosna, "it is difficult to imagine why any person in the class appellant represents could have an interest in seeing [the current parole release practices of the repondents] upheld." Sosna, supra at 403 n.13.

The only factor preventing this case from falling squarely within the confines of Sosna and Pugh is the fact that, although treated as a class action, this case never was formally certified by the District Judge, who did not permit the Complaint to be filed in forma pauperis. This factor, however, should not, under the circumstances presented here, present a barrier to the Court addressing the merits of this cause. First, there is a justifiable reason why no formal certification of the class was obtained: the District Judge precluded certification by dismissing the Complaint sua sponte. To moot this cause now because of an occurrence wholly outside the control of the litigants would not further any of the salutary purposes underpinning the mootness doctrine. Second, although not formally certified, this cause was treated as a class action by both the District Court and the Court of Appeals. Third, strong support for petitioners' position comes from a line of federal cases holding that subsequent events rendering a case moot as to the named party in a case initiated as a class action, though not officially certified, does not affect the justiciability of the case for the remainder of the class. The leading case on this point is Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969), aff'd sub nom. Wyman v. Bowers, 397 U.S. 49 (1970). There, in a case challenging the constitutionality of a welfare durational residency requirement, the absence of formal class certification did not prevent the court from holding that, despite the resolution of the named plaintiffs' claims, the suit was not moot, and new named members of the class could intervene. Pertinently, the Court observed:

> "When the action was commenced, however, Gaddis was properly a representative of the purported class. To say that the whole action is mooted simply because it may be moot as to the named plaintiff would be contrary to the express purpose of Rule 23(e), which prohibits dismissal or compromise of a class action if the result would be to injure the other members of a purported class." Id. at 715.

Even though, as here, the class never officially was certified, the court found that in the interim between filing and certification the case must be assumed to be a class action: "A holding that an action commenced as a class action retains that character until a Court finds otherwise is supported by the Advisory Committee's note on the 1966 amendments to Rule 25." Id. See J. Moore, Federal Practice §23.50, at 23-1103 (2d ed. 1969). For other cases employing similar reasoning and reaching a similar result, see: Jones v. Diamond, 519 F.2d 1090, 1097-99 (5th Cir. 1975); Cruz v. Hauck, 515 F.2d 322, 325 n.1 (5th Cir. 1975); Frost v. Weinberger, 515 F.2d 57, 62-65 (2d Cir. 1973); Huff v. N.D. Cass Company of Alabama, 485 F. 2d 710, 713 (5th Cir. 1973) (en banc); Mick v. Sullivan, 476 F. 2d 973 (4th Cir. 1973); Kahan v. Rosenstiel, 424 F. 2d 161 (3d Cir. 1970); Cypress v. Newport News Gen. & Non-Sectarian Hosp. Ass'n., 375 F. 2d 648, 667 (4th Cir. 1967) (en banc); Brown v. Liberty Loan Corporation of Duval, 392 F. Supp. 1023 (M.D. Fla. 1974); La Reau v. Manson, 383 F. Supp. 214 (D. Conn. 1974); Gatling v. Butler, 52 F.R.D 389 (D. Conn. 1971); Vaughan v. Bower, 313 F. Supp. 37, 40 (D. Ariz.) (3-judge ct.), aff'd 400 U.S. 884 (1970).

D. UNDER THE SPECIAL CIRCUMSTANCES PRESENTED IN THIS CASE, EFFECTIVE JUDICIAL ADMINISTRATION AND FIDELITY TO THE INTENT OF FED. R. CIV. P. 23 COUNSEL THAT PETITIONERS' MOTION FOR LEAVE TO SUBSTITUTE NAMED PETITIONERS, OR, IN THE ALTERNATIVE, TO INTERVENE BE GRANTED.

Although it is urged that this action is not moot under the current state of the record, the petitioners have filed -- out of an abundance of caution -- a motion, pursuant to Fed. R. Civ. P. 21, 23, and 24, seeking to substitute, add, or intervene with additional prisoners currently incarcerated in Kentucky and immediately subject to the parole release jurisdiction of the Kentucky Parole Board. The motion primarily is bottomed on the procedure approved in Mullaney v. Anderson, 342 U.S. 415 (1952), where the Court sustained a motion to add party plaintiffs filed to meet a suggestion by the defendants that the named party in the case did not have standing to maintain the suit. Specifically, the defendants alleged that the named parties -- a union and its officials -- did not have standing to sue on behalf of non-residents union members in an action challenging a license fee imposed by the Territorial Legislative of Alaska. To quell this allegation, the plaintiffs sought to add two non-resident union members. Relying on Fed. R. Civ. P. 21, the Court granted the

motion; Justice Frankfurter's reasoning is equally applicable to the present case:

> "This addition of these two parties plaintiff can in no wise embarrass the defendant. Nor would their early joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration...." Id, at 417.

On this authority alone, petitioners' motion should be granted. See also Rogers v. Paul, 382 U.S. 198 (1965); Benson v. State of California, 328 F.2d 159 (9th Cir. 1964); McCausland v. Shareholders Mgt. Co., 52 F.R.D. 521 (S.D.N.Y. 1971).

III.

THIS ACTION, WHICH DOES NOT SEEK TO AFFECT THE DURATION OF THE PETITIONERS' CONFINEMENT BUT SEEKS ONLY PROSPECTIVE INJUNCTIVE RELIEF, IS PROPERLY COGNIZABLE UNDER 42 U.S.C. §1983.

Relying on Preiser v. Rodriguez, 411 U.S. 475 (1973), the respondents argue (Brief for Respondent at 9-10) that the petitioners' complaint should be treated as a petition for a writ of habeas corpus under 28 U.S.C. §2254, rather than as a civil rights action cognizable under 42 U.S.C. §1983. As a habeas action, they urge that the petitioners be required to exhaust their state remedies prior to reinstituting this action in federal court. This argument finds no support either in Rodriguez or in the settled interpretation of 28 U.S.C. §2254. See Bradford v. Weinstein, 519 F.2d 728, 733-35 (4th Cir. 1974).

A. THE EXHAUSTION REQUIREMENT OF 28 U.S.C. §2254(b), AS CONSTRUED IN PREISER v. RODRIGUEZ, DOES NOT EXTEND TO A SUIT SEEKING ONLY TO AFFECT THE PROCEDURE OF FUTURE PAROLE HEARINGS.

The opinion in Rodriguez espouses three propositions, all relevant to state's contention. First, the Court reaffirmed its earlier decisions holding that there is no judicial requirement of exhaustion of state remedies in suits under the Civil Rights Act of 1871, 42 U.S.C. §1983 (411 U.S. at 477). Second, the Court similarly reaffirmed the principle that a §1983 action was available to state prisoners no less than to others complaining of unconstitutional conduct engaged in under color of state law, and that there was to be no general rule that the special problems of federal involvement in state prison administration warranted an exhaustion requirement in prisoner suits under §1983 (411 U.S. at 498-99). Third, the Court held that a prisoner "challenging the very fact or duration of his physical imprisonment, and... [seeking] a determination that he is entitled to immediate release or a speedier release" (411 U.S. at 500) (emphasis added), may not avoid the exhaustion requirement of the habeas corpus

statute by basing the action on §1983 instead.[15] Where the action is "close to the core" of habeas corpus (411 U.S. at 489), the Court held, the "specific determination" of Congress (411 U.S. at 490) that habeas corpus relators first exhaust state judicial remedies must be respected regardless of the plaintiff's choice of jurisdictional base. In light of these propositions, it is evident that Rodriguez was carefully grounded in "explicit congressional intent" (411 U.S. at 489) and did not attempt, as the state does, to convert the exhaustion requirement from a legislative one involving habeas corpus to a judicial one involving state prisoners.

Subsequent decisions support this analysis. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court held that Rodriguez, while barring an attack on the forfeiture of good-time credits by reason of allegedly unconstitutional disciplinary proceedings, did not require exhaustion as to an attempt to obtain "an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations." Id. at 555. In Gerstein v. Pugh, 420 U.S. 103 (1975), Rodriguez was held inapplicable to a claim by arrestees that they were constitutionally entitled to a judicial determination of probable cause for pretrial detention:

> "Respondents did not ask for release from state custody.... They asked only that the state authorities be ordered to give them a probable cause determination.... Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy." Id. at 107 n.6.

The foregoing passage from Pugh is fully applicable to the challenge mounted in this case; indeed, with words such as "constitutionally adequate parole hearing" substituted for "probable cause determination," it describes this case. Although in both the ultimate motive for the prisoner's challenge is to enhance the likelihood of future release, that insight does not convert this proceeding into a challenge to confinement as contemplated by Rodriguez. The Complaint here, as in McDonnell, asked only for declaratory and prospective injunctive relief (A.8). It cannot be said that the petitioner is using §1983 as a pretext to avoid the exhausion requirement of the habeas corpus statute. The legislative judgment requiring exhaustion, therefore, is not at risk. That is all that Rodriguez properly sought to protect.

B. SECTION 2454(b), EVEN IF IT WERE APPLICABLE, WOULD NOT REQUIRE EXHAUSTION IN THIS CASE, BECAUSE PURSUIT OF STATE REMEDIES WOULD BE FUTILE.

Section 2454(b), by its own terms, provides that exhaustion is not required where "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" (emphasis added). As mentioned above, p. , prisoners in Kentucky have availed themselves of the only state route -- a declaratory judgment action --available to challenge the constitutional adequacy of the procedures employed by the Kentucky Parole Board in parole release hearings. That challenge was singularly unsuccessful.

In Harrison v. Robuck, 508 S.W. 2d 767 (Ky. 1974), in response to a prisoner's allegation that the Parole Board "abuse[d] their discretion" by denying him, among other safeguards, a statement of reasons upon refusing to grant parole, the high Court in Kentucky flatly rejected any notion that due process procedures belong in the parole release process. The Court relied on the broad discretionary powers vested in the Board by the legislature and stated that it was "unwilling to impose more stringent procedural requirements on the Parole Board than are required of analogous administrative agencies." Id. at 768. To require these petitioners to return to the state courts with their present claims would be an exercise in futility. Section 2254(b) is, therefore, satisfied. See e.g., Evans v. Cunningham, 335 F.2d

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[15] 28 U.S.C. §2254(b) provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstnaces rendering such process ineffective to protect the rights of the prisoner."

...) (4th Cir. 1964); Developments in the Law -- Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1098-1100 (1970).[16]

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[16] Although not raised by the state, the Solicitor General claims that a substantial question exists whether this action should have been heard by a three-judge court pursuant to 28 U.S.C. §2281. This submission, based as it is on a technical statute which is to be strictly construed, see, e.g., Gonzales v. Automatic Employees Credit Union, 419 U.S. 90 (1974); Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 541, 545 (1972), cannot withstand scrutiny under the facts of this case. First, the petitioners here do not challenge a specific statute, regulation, policy, or practice. What is complained of is the absence of such a policy or regulation. The petitioners are seeking to fill a vacuum that the Parole Board has not filled. Even under a generous definition of the concept of policy or practice, the practices of the Parole Board in release hearings are "simply amorphous." Leonard v. Mississippi State Probation and Parole Board, 509 F.2d 820, 823 (5th Cir. 1975). This insight is implicit in the decisions of other Circuits on the issue presented here, e.g. Bradford v. Weinstein, supra; United States ex rel. Johnson v. Chairman, New York State Board of Parole, supra; Dorado v. Kerr. 454 F.2d 892, 895 (9th Cir. 1972), none of which was rendered by a three-judge court See also Baxter v. Palmigiano 96 S.Ct. 1551, 1555 n.2 (1976).

Second, practices of administrative officers which are not clearly mandated by a statute or a regulation do not require the convening of a three-judge court. The statute "precludes a reading which would bring within its scope every suit to restrain the conduct of a state official, whenever, in the ultimate reaches of litigation, some enactment may be said to authorize the questioned conduct." Phillips v. United States, 312 U.S. 246, 253 (1941).

Third, the granting of the injunctive relief requested here would not result in the "improvident state-wide doom by a federal court of a state's legislative policy." Phillips v. United States, supra at 251. It hardly needs saying that there is no state legislative policy to deny due process to petitioners. Simply requiring administrative officers to comply with constitutional mandates in the course of effectuating a state statute is not a challenge to the statute within the province of §2281. See Pitts v. Knowles, 339 F. Supp. 1183 (W.D. Wis. 1972), aff'd 478 F.2d 1405 (1973).

Fourth, even if the injunctive relief requested here should properly have been before a three-judge court, the declaratory relief requested could properly be heard by a single district judge. See Kennedy v. Mendoza - Martinez, 372 U.S. 144, 154-55 (1963). Lack of jurisdiction over the request for injunctive relief would not destroy the court's jurisdiction over the prayer for declaratory relief. That portion of the case, therefore, is properly before this Court.

Fifth, in a real sense, the treatment of the suit by the district court mooted the question of the propriety of convening a three-judge court. It is established that a single district judge may dismiss a complaint if it raises insubstantial constitutional issues, Ex Parte Poresky, 290 U.S. 30, 31-32 (1933). In such a case, the proper route of appeal lies to the Court of Appeals and then to this Court. MTM. Inc. v. Baxley, 420 U.S. 799 (1975). The evolution of this litigation properly brings before this Court the question of the substantiality of the constitutional issues raised in the Complaint.

Finally, under The Three-Judge Court Amendments, Pub. L. No. 94-381 (Aug. 12, 1976), Congress articulated a national policy limiting the convening of three-judge courts to a specific class of cases. Under the amendments, the issues raised in this case would not require the convening of a three-judge court.

CONCLUSION

For the foregoing additional reasons, the judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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